THE ALTERNATIVE OF OPTIONAL INDIAN BAND GOVERNMENT LEGISLATION

MINISTER OF INDIAN AND NORTHERN AFFAIRS

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The alternative of optional Indian Band Government Legislation could represent an affirmation of the special responsibilities of the federal government and the Minister of Indian Affairs for the Indian people. Legislation which would base Indian Band government upon the concept that the primary locus of decision-making is within the Indian Band itself, furthermore, is consistent with the principle that the membership of a Band should be the body which determines the nature, direction and pace of its internal social, economic, political and cultural development. Such legislation would of necessity be quite complex, however, and to proceed with it would require prior resolution of a number of important questions and key issues.

1. Bearing in mind the wide cultural diversity of the Indian people of Canada, and that the needs of Indian communities, conditioned by their geographical location and economic milieu, are as varied as those of other Canadian communities, it is recognized that a single, nationally-applied approach to such a multiplicity of conditions is inappropriate. Thus any new system should probably not be obligatory. It should be developed as an alternative to the present series of Indian Act Band government provisions, and those Bands which wish to continue to operate under that present system should be allowed to do so.

   However, this leads to a further implication. If there is to be an alternative system of Indian government for Indian Bands to opt into, it will have to be formulated in such a way that it is significantly different from the present system. Thus, while retaining certain linkages between the existing Indian Act and the new legislation (e.g. items which apply to Indians as Indians), the nature of the control which Indian Band members and their Indian Band governments exercise over their basic resources will need to be substantially altered. This will mean that Indian Bands contemplating moving under the provisions of any such legislation will need to look at the decision in terms of a long-term rather than a short-term commitment. Once a decision is made, it will engender a set of circumstances relating to independent local control - the total responsibility for the management of lands, for trust funds, for long-term decisions affecting the future of all Band members - which might not be easy to reverse.

Any legislation would therefore have to indicate basic criteria which would need to be considered very seriously by both the Band, and others involved in the process, at the time when such an "opting-in" choice is being considered. The main criterion might be a level of demonstrated ability to carry out the anticipated activities of local government, including local program and financial administration, which such a system would require.

2. As stated earlier, if a system of Indian Band Government is to be meaningful, if it is to be accepted, if it is to be effective, it must be created at the local level. It cannot be imposed; by its very nature, it must arise out of the collective will of those to be governed.

One way to assure local support for a new system of Indian Band Government would be to have each interested Band develop its own Band Charter and to make this one of the requirements for entry into Indian Band Government legislation. This Charter, or constitution, would outline, in its own terms, the nature of the relationship which would exist between the Indian Band government and the Band membership. Generally, it could include:

a) the style of Band government (elected or traditionally selected);

b) the means of election or selection;

c) the conditions associated with obtaining and retaining of office;

d) the methods of accounting to the people for the exercise of public office;

e) the matters over which the people would retain final control;

f) the rights of both the individual and the Band which would need to be respected by the Band government;

g) the methods of amending the Band Constitution.

A Band Charter would, unlike the present Indian Act, be a statement of a Band's intentions towards a system of local government rather than a document outlining a detailed administrative structure.

3. The way in which an Indian Band government chooses to exercise the authority and program powers which they would be recognized as having, would be one of the major indicators of administrative flexibility which local Indian governments would have in any proposed legislation. The power to pass authoritative by-laws; the power to adopt other pertinent laws by reference if they so choose; the ability to enter into agreements with other Bands and other government authorities and agencies to provide services on reserves; the ability of developing that service delivery capability themselves; the power to enter into agreements with banks and other financial institutions in their own right; the power to raise additional financial resources within their own jurisdictions by levying taxes on both Indian and non-Indian interests; the power to act, in short, as a responsible, accountable, recognized unit of local government, making its own decisions about matters affecting its own community - this would probably have to be the essence of any proposed legislation.

4. Once Bands had acquired powers in areas such as those just discussed, a true form of local government would clearly exist. Given the special position of Indian Bands and the Federal Government's jurisdiction, other powers could subsequently be contemplated.

   a) Existing Band powers could be strengthened, for example, simply by freeing Bands of the requirement under the Indian Act to seek Ministerial approval for by-laws passed in Band jurisdictional areas. Those jurisdictional areas likely could encompass some or all Band Council powers listed in Sections 81 and 83 of the Indian Act.

   b) Federal powers currently exercised with respect to Indian Bands which could be considered for devolution to bands include power in the areas of membership (subject to anti-discrimination provisions in the Constitution of Canada and consistent with such provisions in a revised Indian Act), health, management and control of reserve land and trust monies, housing, social assistance, and control of non-renewable resources on reserve.

   c) Through negotiation between interested Bands, the Provinces, and the Federal Government, it could also be arranged that Band governments acquire power or a share of power in such areas as child welfare and law enforcement on reserve.

5. If Indian Band governments are to have full control and to exercise management over their lands, it would be necessary to give the Band real authority and responsibility to grant interests in land to both Indians and others. At the same time,

Indian Band Government Legislation would have to ensure that the lands remained "lands reserved for Indians", in order to keep such lands within the legislative competence of the Federal Government. Thus, while the reversionary title to Indian Band lands would remain in the Crown, Indian Band governments would have the full capacity to grant interests in land, on behalf of the Band. They would also have the legal status necessary to take action or be a party to action in matters affecting Indian lands.

a) Other items which would have to be addressed in any proposed legislation would include the possible recognition of individual Indian interests in land, existing non-Indian interests, and the necessity for the registering of all interests in Indian lands.

b) The major item which would be addressed in the area of land management, however, would be that of the permanent alienation of reserve land. If a Band, for whatever reason, decided that there was the need to sell a certain portion of the reserve lands, then - under the terms which it would spell out in its Band Charter - it could be empowered to:

   i) conduct its own previously agreed-to referendum procedures to determine the will of the Band members on this issue;

   ii) if an affirmative vote was secured, then to seek the concurrence of the Minister (since the reversionary title would remain with the Crown to this point) in the disposal of the land;

   iii) proceed with all other matters for the relinquishing of their interest in that land.

   The difference in this procedure from the present one would be the determination of procedures by the Band and the requiring of the Minister's concurrence to the proposed sale rather than his approval of it. It is argued by Bands that if they are acknowledged to have the authority to fully manage their own lands, then they should also have the right, without having to seek the Minister's approval, to make any final determination of those lands. This would clarify the Minister's role as trustee for Indian lands of Bands operating under the new legislation.

6. The question of who is entitled to be registered as an Indian - that is, who has legal Indian status - is determined under the provisions of the Indian Act. It would be in keeping with the principle behind Indian Band Government legislation that Bands should be able to determine their own membership, subject to

respect for acquired rights, and some minimal connection, either by descent or by marriage, of the individual with the Band. Assuming that the Indian Act will be changed to eliminate discriminatory provisions with respect to membership, Band criteria for membership discrimination might simply repeat those in the Act. In any event, Band criteria for membership would have to be non-discriminatory and fair.

7. If Bands were given the authority to determine their own membership, the following questions might need to be answered:

a) Could Bands advance membership to persons who would not be entitled to be registered as Indians under the Indian Act?

b) Would Bands be determining for which Indians the Federal government becomes responsible?

Giving the Indian Bands the authority to determine their own membership under any proposed legislation would not solve the additional problems related to the granting of Indian status. However, it would give Bands the opportunity to come to grips with the basic question, status aside, of whom they consider to be eligible to be considered as bona fide members - by ancestral determination, perhaps by cultural affiliation - of their own Indian extended-family community.

8. There is presently a lack of clarity in the interpretation of the present Indian Act concerning the by-law making authority of Band Councils. One of the features of any proposed legislation would have to be a clear statement of the capacity of Indian Band governments to enact by-laws in order to allow for the implementation of their program powers. Having the power to enact by-laws raises the accompanying issue of how such by-laws would be enforced.

a) At the present time, the policing of reserves is accomplished in three ways:

i) directly by the RCMP in those provinces which have no provincial police forces, and in certain instances by the provincial forces in provinces (Ontario and Quebec) where they exist;

ii) by Indian police officers employed in the Special Native Constable Program (developed in conjunction with the Solicitor-General, the RCMP, and Indian Bands, and administered by the RCMP) or similar Special Constable programs administered provincially in Ontario and Quebec;

iii) by special Tribal Police Forces, such as those developed in conjunction with the Dakota/Ojibway Tribal Council in Manitoba and the Blood Tribal Council in southern Alberta. These Tribal Police Forces, although regarded as pilot projects and again developed in conjunction with the RCMP, go beyond the concept of just the provision of Special Constables, and are aimed at having a more direct Band Council involvement in, and control over, the policing of reserves.

b) The present Indian Act also makes provision, under section 107, for a Governor-in-Council appointment of justices of the peace, who may exercise magisterial authority to deal with the commission of offences under the Indian Act as well as other offences under the Criminal Code relating to common assault, breaking and entering, etc. where these offences are committed by an Indian or relate to the person or property of an Indian.

9. The area of law enforcement and administration of justice is one of considerable sensitivity in view of the complexity of the justice system in Canada. Nevertheless, there are a number of strategies which are worth considering which might render the justice system more familiar to Indian people.

a) Indian Band governments might be empowered to enter into agreements with the RCMP or provincial police forces to assist in developing Band/Tribal Police Forces;

b) consideration could be given to joint Federal and Provincial appointment of Indian justices of the peace to hear certain offences committed on reserves;

c) Indian Band governments might be authorized to summon offenders against Band by-laws to appear in court and to have such offences heard in courts on the reserve or in adjacent provincial courts;

d) provision might be made for the future development of special courts which, as federally established courts dealing with matters under exclusive federal jurisdiction, might eventually be able to provide an alternative method for dealing with Indians committing offences on reserves;

e) other strategies worthy of investigation would include local peacemaker courts and a quasi-judicial national Indian tribunal, or institution which would add a decidedly Indian perspective to justice administration on the reserves of Bands under Indian Band Government legislation.

These strategies would have to be considered with due regard to such questions as whether Band by-laws would apply to non-Band members, and who would enforce the by-laws with respect to non-Band members if they do.

10. Indian leaders have strongly maintained that the Minister of Indian Affairs has a very specific trust relationship with Indian people which he must observe in his dealings both with them and on their behalf. They perceive this relationship as relating to the matters of the protection of Indian lands and Indian interests in those lands; of the securing and protection of financial resources for Indians and of all matters arising out of the Treaties and the Federal government's responsibilities for Indians.

a) While there are different views about this all-inclusive view of the Minister's relationship to Indian people, the Indian Act certainly indicates the approval of the Minister is required before many matters affecting Indians can become effective. Some of these have been referred to in the covering paper. Generally, they include:

i) the surrender for sale or leasing of reserve lands;

ii) the holding and disbursement of moneys arising from the sale of lands, exploration leases, natural resource royalty payments, etc.;

iii) matters relating to Indian status;

iv) the control of Indian wills and estates;

v) entering into agreements with provincial governments for the provision of certain services;

vi) setting aside portions of the legislation; and

vii) having the Governor-in-Council effect regulations which control the daily life and conduct of the affairs of Indians on reserves.

b) In their totality, they constitute not so much a trust relationship as a dependency relationship. Therefore if, under any proposed legislation, Bands are to be able to have and to exercise a system of local self-government under which they become responsible for the essential elements of their own development, it would follow that the relationship between themselves and the Minister would be significantly changed.

11. One of the major changes which could be brought about by Indian Band Government legislation might be that the Minister would no longer be regarded as having a residual fiduciary trust responsibility for decisions made by an Indian Band government from the point at, and in the jurisdictional area within which, it assumes local control (responsibility) over its own affairs. The decisions it makes would be its own; the long-term responsibility would be its own. However, this would not reduce any existing responsibility which the Minister may have up until that local control is assumed. The Minister's general responsibility for monies voted by Parliament would continue, as would the Minister's responsibilities in areas where the Minister's authority is retained.

a) As far as the relationship between a Band under such legislation and the Department would be concerned, this also would likely be substantially altered. At present, the Department is charged, both under the legislation and the regulations of the Indian Act and the Financial Administration Act, with supervising and controlling the activities of Band Councils, whether this be as a result of joint service delivery to Bands or arising from the terms and conditions of Contribution Agreements, whereby Bands assume the delivery of program services on behalf of the Department.

b) Under any proposed legislation, the relationship between the Department and a Band would probably be one which would be very much an "arms-length" relationship, although it would not preclude a Band being able to ask for and receive any necessary advice and support from the Department.

12. One very important dimension of Indian Band Government Legislation would relate to funding provisions. The legislation would require as a prior condition that the necessary financial resources are available to make it work.

How funds might be obtained by the Department for Indian Band governments and accessed by the latter also requires investigation:

a) The preparation of a comprehensive expenditure plan by the Indian Band government could be required.

b) The Minister could account to Parliament for the funds allocated to Indian Band governments according to specified terms.

Indian Band governments would presumably have to meet their own assumed responsibility for the proper use and expenditure of these funds, and become accountable to their own Band members, within the terms of both the legislation and the Band Charter and by-laws, for maintaining agreed-to levels of program service delivery.

13. Under the present Indian Act, the Minister is required to investigate appeals which come to him from Indian Band members concerning irregularities and suspected wrong-doing which may emanate from the way in which the affairs of the Band are conducted. With a changed relationship between the Minister and a Band under new legislation, this type of regulated appeal procedure would probably cease to be appropriate.

In addition, since Bands operating under such legislation might be exercising considerable extra authority in the area of enacting by-laws, some specific point of reference would seem to be needed at which the content, working and applicability of by-laws could be checked, both before and after the fact, if necessary.

a) One approach would be to refer all these matters to an appropriate Court. A problem is that court proceedings are invariably lengthy and costly affairs, and prospective litigants, especially individual Indians, are often unlikely and unable - even unwilling - to try and avail themselves of this formal avenue of complaint and redress. An alternative to court action might therefore be required.

b) It might be advisable to have any proposed Indian Band government legislation provide for an independent, advisory commission to assist in the operation of a system of Indian Band government.

c) The institution of such a commission need not preclude parties from seeking further decisions from the Courts.

d) Disputing or complaining parties need not be required to take their concerns to the commission if they did not wish to do so.

14. Since Band governments established under Federal legislation would be Junior governments, much like Municipal governments are junior to the Provinces which create them, the Federal Government would continue to play some kind of supervisory role, by which is meant that it could have the authority to review and reject Band by-laws if necessary.

a) This role could only be played effectively if the criteria for reviewing and/or rejecting Band by-laws were well laid out in advance.

b) The Federal Government could, perhaps, stipulate its right under the legislation to establish regulatory frameworks, as it thought necessary, to limit the substance of Band by-laws as required. For example, Federal regulations could set limits to Band options in Band jurisdictional areas like fire control and personal safety. Federal regulations in such areas could be designed to assure compatibility between Band laws and the laws of the surrounding Province and of neighbouring municipalities.

15. Because Band government by-laws in areas such as lands and resources management may impact upon neighbouring municipalities and/or provincial lands, it might be necessary to have mechanisms established for assessing that impact in the event that it is claimed to be negative. This same mechanism would presumably be available to assist a Band government if a perceived negative impact were being suffered by the Band because of municipal and/or provincial laws as well.

One idea is that the mechanism envisioned would be ad hoc bodies to be established jointly by the federal and provincial governments in response to an appeal by a Band or by a Municipal government. The Joint Bodies could therefore be part of a review process which would yield recommendations that might include the advice to delay or change a Band, municipal or provincial law.

There are, therefore, a great many complex questions which would need to be addressed before the alternative of optional Indian Band Government legislation could be proceded with. In the attempt to answer these questions Indian Bands would have to be extensively consulted because their concerns are most clearly at issue. Furthermore, provincial governments and the people of Canada generally should be invited to express their points of view. The strengthening of Indian government would be a major step in the continuing evolution of the relation between Indian people and the Government of Canada, a step which would need wide support if it is to be taken successfully.